89-603

No. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

BUCHOLTZ AVIATION, INC.,

Petitioner,

vs.

CITY OF BUFFALO,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI

JAMES L. MAGAVERN*
MAGAVERN & MAGAVERN
Attorneys for Petitioner
20 Cathedral Park
Buffalo, New York 14202
Telephone No.: (716) 856-3500

* *Counsel of Record*

Batavia Times Publishing Co.
Batavia, New York (716) 344-2000

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QUESTIONS PRESENTED FOR REVIEW

1. Has the regulation of airports according to criteria of ground safety and noise generation been pre-empted by the Federal Aviation Act, and is an attempt by state and local government to prohibit the operation of an airport approved by the Federal Aviation Administration therefore in violation of the Commerce and Supremacy Clauses of the United States Constitution?

2. When an airport owner has constructed and opened an airport in reliance upon a permit issued by a local government, when the local government later claims that the ordinance under which the permit was issued was superseded by subsequent state legislation, and when the local government has power under the subsequent legislation to authorize continued operation of the airport, may the local government, consistent with the due processes and equal protection clauses, revoke the original permit and refuse to grant an application for a new permit without giving the owner an opportunity to be heard and without consideration of the application on its merits?

3. Under those circumstances (set forth in the immediately preceding paragraph), is the owner entitled to compensation under the just compensation and due process clauses of the United States Constitution?

4. May a local government, consistent with the due process and equal protection clauses, make permission to establish a heliport dependent upon approval by a specified percentage of the private persons residing within a specified distance of the heliport?

The New York Court of Appeals dismissed Bucholtz's appeal on all the foregoing issues.

PARTIES

The parties to the New York court proceeding are shown in the caption. The Solicitor General of the State of New York, notified under New York State law because the constitutionality of a state statute has been drawn in question, has not intervened.

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IN THE

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October Term, 1989

No. _____

BUCHOLTZ AVIATION, INC.,

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vs.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The court in which the proceeding was initiated, the New York Supreme Court, County of Erie, rendered the unreported opinion set forth in Appendix "A" (pp. 1a through 5a). The Opinion of the Supreme Court, Appellate Division, Fourth Judicial Department, is reported at 147 A.D.2d 915, 537 N.Y.S.2d 370, and is set forth in Appendix "B" (pp. 6a through 13a). The decision of the Court of Appeals, is reported at 74 N.Y.2d 714, is set forth in Appendix "C" (p. 11a).

JURISDICTION

The proceeding was commenced by the City to enjoin Bucholtz from operating a heliport in the City, claiming that Bucholtz had failed to obtain the approval of the Common Council of the City and of the New York State Commissioner of Transportation pursuant to Section 249 of the New York General Business Law. At issue are the questions whether attempts to regulate airport noise and ground safety under that statute have been pre-empted by the Federal Aviation Act and whether, if that statute is upheld, the City infringed Bucholtz's procedural and substantive due process and equal protection rights in attempting to revoke a heliport permit granted to Bucholtz under a City ordinance, and in failing to grant Bucholtz a hearing and to consider its application for approval under Section 249 of the General Business Law.

On May 6, 1988, on a motion and cross-motion for summary judgment, the New York Supreme Court, County of Erie, the court of first instance in the case, ordered a trial of issues of fact and did not pass on any of the issues of law (Appendix, p. 5a). The order was entered May 11, 1988. The Appellate Division of the Supreme Court, Fourth Judicial Department, modified the lower court order by granting a permanent injunction prohibiting operation of the Bucholtz heliport, in an order and accompanying memorandum entered February 3, 1989 (Appendix, p. 6a), on the basis of which a judgment was entered February 14, 1989. On Bucholtz's appeal to the New York Court of Appeals on federal and state constitutional grounds, that Court ordered that the appeal be dismissed "upon the ground that no substantial constitutional question is directly involved" (Appendix, p. 11a).

The Court of Appeals order (here sought to be reviewed), was dated June 8, 1989, and entered June 15, 1989 in the Erie County Clerk's Office. By order signed by Mr. Justice Thurgood Marshall, dated August 30, 1989, this Court extended the time for filing this petition to and including October 6, 1989.

Jurisdiction of this petition for a writ of certiorari is conferred upon the Supreme Court of the United States by 28 U.S.C. §1257. The petition draws in question the validity of a state statute on the ground that it is repugnant to the Supremacy and Commerce Clauses in Article I, §8 and Article VI of the United States Constitution, and claims violations of Bucholtz's due process and equal protection rights under the Fourteenth Amendment to the United States Constitution. The highest court of New York has held that the statute is valid, and that Bucholtz's rights were not violated.

STATUTES AND ORDINANCES

Section 249 of the General Business Law provides that "[n]o person shall hereafter establish a privately-owned airport or make an airport improvement to an existing privately-owned airport except by authorization of the governing body of the city, village or town within which such airport or any part thereof is proposed to be established or improved." It also requires the local governing body to request a determination by the State Commissioner of Transportation that the authorization would meet his standards. Various terms used in Section 249 are defined in Section 240 of the General Business Law. Sections 249 and 240 are found in Book 19 of McKinney's Consolidated Laws of New York, Annotated, and are set forth in full in Appendix "D" (pp. 12a-17a).

Section 2(a) of Chapter VII of the Ordinances of the City of Buffalo (the "Ordinance"), as it read during the times here pertinent, prescribed height limitations for the operation of aircraft, but authorized the City Director of Licenses to grant temporary or permanent permits for take off or landing of helicopters. A copy of that Ordinance is set forth in Appendix "E" (pp. 18a-20a).

The Common Council of the City amended that Ordinance on September 15, 1987 to reflect the requirements of Section 249 of the General Business Law, and, in addition, to provide that airports may not be established without the consent of 65% of the persons residing within 1,500 feet of the site. A copy of the amended ordinance is set forth in Appendix "F" (pp. 21a-26a) (to be referred to here as the "Amended Ordinance").

The pertinent federal statute is the Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. §§1301 *et seq.*, as amended by the Noise Control Act of 1972, 86 Stat. 1234, which grants to the Federal Aviation Administration broad authority to regulate the navigable airspace in order, among other purposes, "to insure the safety of aircraft and the efficient utilization of such airspace," "for the protection of persons and property on the ground," and "for the control and abatement of aircraft noise" (49 U.S.C. §§1348, 1431). Those sections are set forth in Appendix "G" (pp. 27a-34a).

As noted above, Article I, §8 (Commerce Clause), Article VI (Supremacy Clause), and the Fourteenth Amendment to the United States Constitution are also involved.

STATEMENT OF THE CASE

On November 11, 1986, Bucholtz applied to the City Director of Licenses under Section 2(a) of Chapter VII of the Buffalo Code of Ordinances (the "Ordinance") for a permit to operate a heliport on 14 acres of land in an industrial zone that he had contracted to purchase (R. 20, 26, 29).[1] On April 3, 1987, the Federal Aviation Administration approved the site, including the projected flight paths to be followed at the heliport (R. 36-37). On April 27, 1987, the Director of Licenses designated the Bucholtz property as a Temporary Landing Site so long as the required insurance was maintained (R. 38). Subject to the insurance requirement, which Bucholtz subsequently satisfied, the permit was approved by the Commissioner of Police (who later reported very few complaints about the operation), the Commissioner of Fire, and the Corporation Counsel of the City (R. 34, 38, 46; Appendix B to the City's Brief to the Appellate Division, pages A3-A4). None of the City officials involved required any further approvals.

In an opinion rendered on July 16, 1987, the Corporation Counsel of the City changed his position and stated that approval of the State Commissioner of Transportation was required by Section 249 of the General Business Law for establishment of the heliport (R. 47). In response, on July 21, 1987, Bucholtz submitted an application to the Common Council under that statute, without conceding the correctness of the interpretation of the Corporation Counsel or validity of Section 249 (R. 48, 49). The Common Council did not accord Bucholtz an opportunity to be heard on its application, and refused to consider it on its merits. The Common Council waited until September 15, 1987 to address the application, and on that occasion merely

[1] These and other similar references are to pages of the Record on Appeal before the Appellate Division and Court of Appeals.

noted that it had been received and filed (R. 25). The Common Council adopted the Amended Ordinance on the same date.

In reliance on the permit from the Director of Licenses and actions of other City officials, Bucholtz expended in excess of $250,000 to improve the heliport, in addition to the cost of the land (R. 77).

In addition to the use of the Bucholtz facilities for Mercy Flight rescue operations, the City Police Department uses them for lifesaving and enforcement operations, and the Erie County Sheriff uses them for a variety of critical functions, including rescues and aerial searches, at times in conjunction with investigations of the F.B.I. and Drug Enforcement Administration (R. 28, 41-43, 63-64, 77). Public utility companies also use the facilities for emergency accident and disaster services (R. 77).

The evidence reveals that the efforts of the Common Council to revoke the Bucholtz permit and close down the heliport without giving Bucholtz an opportunity to be heard were made without regard to the important public interest in providing those services, and without any consideration of the merits. Rather, the City's actions resulted from the generation by the District Councilman for the area of unwarranted anxiety on the part of a small group of residents of properties near the site, for the purpose of gaining support in his re-election campaign (R. 45, 61-62).

The constitutional issues were raised by Bucholtz's Answer to the City's Complaint, as follows: Federal pre-emption (Third Affirmative Defense); arbitrariness of the Common Council's actions, and failure to accord Bucholtz equal protection and procedural due process in violation of Bucholtz's constitutional Fourteenth Amendment rights (Sixth Affirmative Defense and Second Counterclaim, Eighth Affirmative Defense and

Fourth Counterclaim, and Fifth Counterclaim); constitutional violations in the City's adoption of the Amended Ordinance (Seventh Affirmative Defense and Third Counterclaim); and compensation required if an injunction is granted (Fourth Affirmative Defense and First Counterclaim, and Fifth Counterclaim) (R. 95-100).

Bucholtz made these points in the oral argument before the Supreme Court on the City's motion and Bucholtz's cross-motion for summary judgment, with one exception.[2] The Supreme Court did not address these issues, holding that the "matter must proceed to trial where all of the facts and circumstances may be fully developed before the rights of the parties are adjudicated" (Appendix, p. 5a).

With the same exception, all the constitutional issues were raised in Bucholtz's Briefs to the Appellate Division.[3] The Appellate Division modified the lower court decision by granting the injunction and granting the City's motion for summary judgment declaring that the operation of the heliport was in violation of Section 249 of the General Business Law (Appendix, pp. 6a-7a). The Appellate Division necessarily, but without stating its reasons, resolved the constitutional issues against Bucholtz. Rejecting Bucholtz's argument that the City was estopped from revoking the permit granted by the Director of Licenses under the Ordinance, the Court merely stated that it had "reviewed defendant's other arguments on appeal and [found] them to be without merit" (Appendix, p. 10a).

The Court of Appeals dismissed the appeal to it *sua sponte*, without opinion, "upon the ground that no substantial constitutional question is directly involved" (Appendix, p. 11a).

[2] The challenge to the Amended Ordinance was not argued before the Supreme Court, because the City took the position that it did not apply.

[3] See note 2, *supra*.

REASONS FOR GRANTING THE WRIT

The federal questions presented are substantial. They present important questions of federal law in conflict with the decisions of this Court, federal courts of appeals, or other state courts of last resort, or which have not been resolved by this Court.

In holding that Section 249 of the General Business Law, as applied in this case, authorizes the regulation of heliport locations and operations with respect to noise effects, the decision of the New York Court of Appeals is in direct conflict with the decision of this Court in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). See also *American Airlines, Inc. v. Town of Hempstead*, 272 F.Supp. 226 (E.D.N.Y. 1967), affd 398 F.2d 369 (2d Cir. 1968), cert. denied 393 U.S. 1017 (1969). In authorizing such regulation on grounds of air or ground safety, the decision in question is in conflict with the rationale, though not the direct holding, of *Burbank*. And see *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F.2d 812 (2d Cir. 1956).

If allowed to stand without clarification or resolution by this Court, this decision of the New York Court of Appeals may result in uncertainty as to the validity of statutes of other states with provisions similar to those of Section 249 of the New York General Business Law, and in a proliferation of state laws and local ordinances prohibiting heliports and other small airports and thereby forcing helicopters and small aircraft into major airports, with consequent congestion and risk to the safety of their operation.

As indicated by the use of the Bucholtz facilities by the Buffalo Police Department, Erie County Sheriff, F.B.I. and Drug Enforcement Administration for investigative and law enforcement purposes, the

provision of convenient heliport landing sites in urban areas serves important public interests. The New York courts in the instant case have sent the message that such public interests may be casually subjugated to the narrow self interests of individual elective public officers catering to the whims and personal convenience of small groups of citizens. This is arbitrary government action in its most blatant form, particularly where, as here, heliport operators are denied basic procedural due process in their efforts to serve important civic objectives.

1. The Federal Pre-emption Issue

Section 249 of the General Business Law requires approval by the New York State Commissioner of Transportation and the governing body of the appropriate city, village or town for the establishment or improvement of a privately-owned airport. The criteria to be considered by the Commissioner are "the safety of public buildings or facilities, or operations on public highways or waterways" and "the safety of operations at other airports" (Appendix, p. 18a). The reasons given by the City for its refusal to approve Appellant's heliport were that it is allegedly hazardous and noisy (City's Brief to the Appellate Division, pp. 6, 10, 11). The area of regulation covered by all of those criteria—ground safety, air space safety, and noise—has been pre-empted, we submit, by the Federal Aviation Act. (Any question of residual state or local authority to regulate airport location within the context of land use control laws and procedures is irrelevant to this litigation, since the site of the Bucholtz heliport is zoned industrial, and the heliport was established in compliance with local land use planning laws.)

In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the Court held that the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972, pre-empted state and local control over the regulation of aircraft noise. The decision nullified a city ordinance prohibiting landings and take-offs by jet aircraft between certain hours. The Court pointed out that such restrictions would cause a bunching of flights, increased congestion, a loss of efficiency in the use of the airspace, and an aggravation of the noise problem in surrounding communities. It noted that the Federal Aviation Act "requires a delicate balance between safety and efficiency, 49 U.S.C. §1348(a) and the protection of persons on the ground, 49 U.S.C. §1431(d)(3)," and held that, the "interdependence of these factors requires a uniform and exclusive system of federal regulation * * *." Although the Court in *Burbank* was required to decide only that regulation of noise was pre-empted, the rationale of its decision applies with equal force to the regulation of air safety and ground safety. Hence Section 249 of the General Business Law, deemed by the New York courts in this case to address both air and ground safety concerns, and the City's attempt in this case to regulate noise and ground safety, would seem to be clearly pre-empted by the Federal Aviation Act and invalid under the Supremacy and Commerce Clauses of the United States Constitution. The question merits review by this Court.

2. Due Process and Equal Protection Issues

The City issued Bucholtz a permit to establish the heliport. After Bucholtz had constructed and opened it in reliance upon the permit, at a cost of over $250,000, the City took the position that authorization by the Common Council was required under Section 249 of the General

Business Law. Bucholtz then submitted an application for such authorization. Contrary to advice given by the City's Corporation Counsel, the Common Council did not request a review of the application by the State Commissioner of Transportation. After letting several weeks go by, the Council merely adopted a resolution that the application be "received and filed" (R. 60; Brief of the City to the Appellate Division, p. A19). The Common Council refused to grant Bucholtz a hearing on its application or to consider it on the merits, and the City, in effect revoking the permit it had already granted, sued to close the heliport.

In providing that a privately-owned airport may not be established except by authorization of the municipal governing body, Section 249 of the General Business Law implies a right to apply for such authorization. Under New York law, the function of the Common Council in passing on applications under that statute is administrative in nature, in the category of special permits in which the applicant's property is in the correct zoning district, but his proposed use of the property requires special permission to enable the authorities to ascertain whether it meets express or implied standards. See *Altaire Builders, Inc. v. Village of Horseheads*, 551 F. Supp. 1066, 1072-1073 (W.D.N.Y. 1982). Accordingly, the Common Council is required to comply with procedural due process requirements applicable to administrative proceedings.

The question is not whether the City was estopped by its prior approval under the City Ordinance from revoking the permit it had given Bucholtz, or whether the Common Council is required to grant an application made under the General Business Law for its approval of a heliport. Rather, the question is whether, after

determining that Bucholtz required the further approval of the Common Council, the City satisfied the demands of constitutional due process and equal protection in denying it the right to have its application for the additional approval heard and considered on the merits. The Common Council was telling Bucholtz, in effect: "Although the General Business Law gives you a right to apply for our approval of your heliport, and that is what you should do, we will not entertain your application. We will not consider it."

In the posture of the case at the time Bucholtz presented its application under Section 249, Bucholtz was operating the heliport with the express approval of the Director of Licenses, with the implied approval of the Corporation Counsel of the City, and in compliance with the existing City ordinance governing the subject. At the time, no court had ruled that the Ordinance under which the permit was granted was invalid. Under the circumstances, Bucholtz's interest in the heliport was then real and valuable. It was not starting from scratch as in the case of an applicant for a license with no history of prior government approval, and with no economic stake put up in reliance on the government's own actions. Bucholtz had more than a unilateral expectation of City approval. It had already been authorized by City officials, acting under delegation of authority by the Common Council, with findings that the Bucholtz site was a safe and proper location for a heliport, and that the establishment of the heliport was in the public interest. The Federal Aviation Administration had approved the site and the heliport's flight patterns. Their judgment was compatible with the prior determination of the Common Council itself that heliports were appropriate uses of land in the City if approved by the Director of Licenses and Commissioners of Police and Fire.

We submit that the circumstances spell out a category of flagrant abuse of principles of fair play embodied in federal constitutional guarantees of due process and equal protection. We have found no decisions of this Court directly in point, possibly because of the bizarre nature of the behavior of the Common Council. The situation is closely analogous, however, to the classes of cases in which license renewals are denied without according the applicant a hearing or benefit of consideration of the merits (*e.g., Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983)), or a certificate of occupancy is arbitrarily denied following the granting of a building permit (see *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986)).

3. Illegal Delegation of Power to Private Citizens

Although the City has taken the position that the Amended Ordinance does not apply to this case—it was enacted several weeks after Bucholtz sought Common Council approval under the law then applicable—the Appellate Division stated in its opinion that Bucholtz could apply under the Amended Ordinance (Appendix, p. 10a).[4] Under the circumstances it was incumbent on Bucholtz to address its challenge to the validity of the amendment, which it did in its Brief to the Court of Appeals. The Court of Appeals necessarily determined the issue in its blanket dismissal of all Bucholtz's constitutional claims.

In providing that no privately-owned airport shall be established or improved if the proposed location is within 1,500 feet of property used for residential purposes,

[4] Overlooking the fact that Bucholtz already had an application pending under Section 249 of the General Business Law, a self-executing law requiring no legislative action on the part of the City, so Bucholtz did not need to file a new application under the Amended Ordinance.

unless the prohibition is waived by presentation to the Common Council of a petition requesting the waiver signed by 65 percent or more of those "persons having their residence within 1,500 feet of the proposed location or improvement," in effect the Common Council delegated the authority to a small group of persons to determine, "solely for their own interest or even capriciously," the rights of those in Bucholtz's position. *Eubank v. City of Richmond*, 226 U.S. 137 (1912). The attempted delegation of power is repugnant to the due process clause of the United States Constitution. *Id.;* and *Washington ex rel. Seattle Title Trust Co., Trustee v. Roberge, Superintendent of Building of Seattle*, 278 U.S. 116 (1928). (The Amended Ordinance also suffers from unconstitutional vagueness in failing to define the "persons" entitled to sign waiver petitions. Does it include first- or second-grade children who can write their names, but would not normally be capable of understanding what they are signing?)

The Amended Ordinance does not lie within the exception, enunciated in *Thomas Cusack Company v. City of Chicago*, 242 U.S. 526 (1916), authorizing neighborhood waivers of restrictions on uses of property deemed to constitute nuisances. The Amended Ordinance does not contain any express or implied finding that helicopter landing and take-off sites are nuisances. On the contrary, the history of the Amended Ordinance demonstrates that its sole objective was to close down Bucholtz's heliport in order to support the re-election campaign of a single City Councilman.

4. The Damages Claim

Bucholtz seeks compensation under 42 U.S.C. §1983 for the destruction of its investment made in reliance upon the City's initial permission to develop the heliport. If the permanent injunction were to stand, this does not mean that the City is exonerated from liability for damages caused to Bucholtz by the City's treatment of Bucholtz's permit from the Division of Licenses, or the City's refusal to consider Bucholtz's application for approval under Section 249 of the General Municipal Law. Under those circumstances Bucholtz would be entitled to damages for actions by the City in destroying its heavy investment in the heliport, amounting to a taking without just compensation in violation of the Fourteenth Amendment to the United States Constitution. This is not the case of a proper exercise of municipal police power barring a remedy for a civil rights violation. The basis of Bucholtz's counterclaim for compensation is the *improper* exercise of the City's police power in leading Bucholtz to make large expenditures in reliance on the initial heliport permit, then, after disclaiming the initial permit on the ground that it was granted under an invalid ordinance, refusing to consider its later application for heliport approval under the General Municipal Law. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 901 (1987); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), cert. denied 456 U.S. 973 (1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), cert. denied 455 U.S. 907 (1982).

CONCLUSION

This case presents issues of serious concern to the people of the City of Buffalo, County of Erie, and other communities nation-wide in which the public benefits of convenient heliport facilities may be denied by arbitrary municipal restrictions, which will lead to air traffic congestion and hazard by forcing a concentration of helicopters and other small aircraft into large airports. In addition, the case raises the question, not yet addressed by this Court, whether municipalities may deliberately use their own invalid legislation as a basis for denying persons due process rights and the right to equal protection of the law.

Respectfully submitted,

JAMES L. MAGAVERN*
MAGAVERN & MAGAVERN
Attorneys for Petitioner
20 Cathedral Park
Buffalo, New York 14202

* *Counsel of Record*

APPENDIX "A"

Order and Memorandum of the New York Supreme Court, County of Erie

Order Appealed From

Filed
May 11 1988
Erie County
Clerk's Office

ORDER

STATE OF NEW YORK
SUPREME COURT—County of Erie

———0———

CITY OF BUFFALO, NEW YORK,

Plaintiff,

vs.

BUCHOLTZ AVIATION, INC.,
2760 Sheridan Drive,
Buffalo, New York 14150,

Defendant.

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Index No. H-91771.

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Upon the notice of motion of the Plaintiff for summary judgment, dated January 25, 1988; the affidavit of Samuel F. Houston, Esq., Corporation Counsel of the City of Buffalo, dated January 25, 1988, in support of Plaintiff's motion; the notice of cross motion of the Defendant, dated February 18, 1988; the affidavit of

Harold Bucholtz, dated February 18, 1988, and the affidavit of Thomas Higgins, Sheriff of Erie County, New York, dated February 18, 1988, both in opposition to Plaintiff's motion and in support of Defendant's cross-motion; the complaint, the answer, and all prior proceedings in this matter; and

The Supreme Court, Special Term, having considered the above papers at a hearing on February 23, 1988; having heard the Corporation Counsel, James J. McLoughlin, Esq., of Counsel, in support of Plaintiff's motion and in opposition to Defendant's cross motion, and Magavern and Magavern, James L. Magavern, Esq., of Counsel, in opposition to Plaintiff's motion and in support of Defendant's cross-motion; and having rendered a decision, dated April 25, 1988, denying Plaintiff's motion and Defendant's cross-motion; it is

ORDERED that the motion of Plaintiff for summary judgment and the cross-motion of Defendant are hereby denied.

Dated: Buffalo, New York
May , 1988

PENNY M. WOLFGANG
Justice of the Supreme Court

ENTER:

Granted
May 6 1988
Michelle J. Parmer
Court Clerk

Memorandum Decision Upon Which Order was Based

STATE OF NEW YORK
SUPREME COURT—County of Erie

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CITY OF BUFFALO, NEW YORK,
Plaintiff,

vs.

BUCHOLTZ AVIATION, INC.,
Defendants.

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Index No. H-91771.

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SAMUEL F. HOUSTON, ESQ.
Corporation Counsel
BY: JAMES McLOUGHLIN, ESQ.
Assistant Corporation Counsel
1100 City Hall
Buffalo, New York 14202
Attorney for Plaintiff

MAGAVERN & MAGAVERN
JAMES L. MAGAVERN, ESQ., Of Counsel
20 Cathedral Park
Buffalo, New York 14202
Attorneys for Defendant

MEMORANDUM

WOLFGANG, J.

In September of 1987, the City of Buffalo commenced a declaratory judgment action against the defendant by service of a summons and complaint. By their complaint,

plaintiff sought an order declaring defendant's heliport operation illegal and unauthorized in that it was not in compliance with the appropriate provisions of the General Business Law of the State of New York. Plaintiff further sought both a Preliminary and Permanent Injunction prohibiting the operation of the heliport unless and until defendant complied with the General Business Law and permission for such operation was given by the City of Buffalo Common Council.

By Order entered and granted on November 5, 1987, this Court denied plaintiff's request for a preliminary injunction. The Court's Memorandum Decision stated in applicable part, as follows:

> "In this case, the plaintiff City of Buffalo has failed to establish either irreparable injury or that a balancing of equities favors their position. To the contrary the record reveals that defendant Bucholtz Aviation, Inc. relied upon the representations of Officials of the City of Buffalo before commencing operations. It is therefore inequitable for the City of Buffalo to now ask this Court for a preliminary injunction, enjoining the defendant from conducting business pending final determination of this action, when the City itself gave approval for the commencement of operations at the heliport."

The plaintiff, City of Buffalo, now moves this Court for summary judgment pursuant to CPLR §3212 upon the ground that there are no triable issues of fact and that there is no merit to the defenses asserted by defendant. It is the contention of plaintiff that the laws of the State of New York prohibit the establishment and operation of a privately owned airport unless (1) there has been authorization by the governing body of the municipality within which the airport is physically located and (2) the State Commissioner of Transportation has made a determination that the airport is in compliance with Commission standards. Plaintiff also contends that it is undisputed that the Common Council of the City of

Buffalo has not approved defendant's application for permission to establish the heliport and further, that the State Commissioner of Transportation has not determined that the establishment of the heliport complies with his standards.

The defendant seeks dismissal of plaintiff's motion and has further cross-moved for the following relief: (1) dismissal of the complaint, (2) a declaration that the heliport has been lawfully established pursuant to the Ordinances of the City of Buffalo, (3) an Order directing the Common Council to request a determination by the New York State Commissioner of Transportation as to whether the said heliport conforms to his standards, (4) an Order permanently enjoining plaintiff City of Buffalo from interfering with the operation of the heliport until such time as the City pays just compensation for their proposed termination of the heliport, and (5) as alternative relief, an Order declaring that plaintiff City of Buffalo shall be prohibited from interfering with the operation of the heliport unless and until the City of Buffalo has requested the New York State Commissioner of Transportation to determine whether or not the defendant's heliport complies with his standards and the Commissioner has made a negative determination.

The Court has fully reviewed all pleadings, affidavits and documentation submitted by both parties and, after said review, denies all motions. The matter must proceed to trial where all of the facts and circumstances may be fully developed before the rights of the parties are adjudicated (see *Wolff v. 969 Park Corp.*, 86 AD2d 519).

Submit Order.

PENNY M. WOLFGANG
J.S.C.

Dated: Buffalo, New York
April 25, 1988

APPENDIX "B"

Order and Memorandum of the New York Supreme Court, Appellate Division, Fourth Department

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1632

Present: DILLON, *P.J.*, DOERR, BOOMER, GREEN, PINE, *JJ.*

———0———

CITY OF BUFFALO,

Appellant-Respondent,

v.

BUCHOLTZ AVIATION, INC.,

Respondent-Appellant.

———0———

The above named City of Buffalo having appealed to this court from certain parts of an order of the Supreme Court, entered in the Erie County Clerk's office on May 11, 1988 and Bucholtz Aviation, Inc., having appealed from certain parts of said order and said appeals having been argued by William Carey of counsel for appellant-respondent, James Magavern of counsel for respondent-appellant, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be and the same hereby is unanimously modified on the law to grant plaintiff the injunctive relief it seeks and to grant plaintiff summary judgment as follows:

Adjudged and declared that the heliport is being operated in violation of General Business Law §249

and as modified the order is affirmed without costs.

Memorandum which is hereby made a part hereof.

Entered: February 3, 1989

CARMEN S. LEONE, *Clerk*

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, CARMEN S. LEONE, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this Feb 3 1989.

CARMEN S. LEONE
Clerk.

(Seal)

1632. (Erie Co.)—City of Buffalo, Appellant-Respondent, v Bucholtz Aviation, Inc., Respondent-Appellant—Order unanimously modified on the law to grant judgment in accordance with Memorandum herein and as modified affirmed without costs. Memorandum: Plaintiff moved for summary judgment declaring that defendant is operating a heliport within the limits of the City of Buffalo in violation of General Business Law §249. Plaintiff also seeks a permanent injunction enjoining the heliport operation. Defendant cross-moved for summary judgment seeking, *inter alia*, a declaration that the heliport was lawfully established pursuant to an ordinance of the City of Buffalo then in effect (*see*, former Buffalo Code, ch VII, art I-a, §2 [a]). Supreme Court's order denying both motions must be modified and summary judgment granted to plaintiff.

On February 23, 1987, defendant completed the purchase of land intended for use as a heliport site. Prior to the closing, defendant had applied to the Federal Aviation Administration (FAA) for approval and had applied to the City Director of Licenses for a permit to use the property as a heliport. On April 3, 1987, the FAA approved defendant's application for use of airspace and on April 27, 1987, the License Director, with the approval of the Police Commissioner, issued a temporary permit to the defendant to use the site as a heliport.

In issuing the permit, the Director of Licenses acted under an ordinance which had been in effect before enactment of General Business Law §249, which became effective January 1, 1970. Section 249 requires the

authorization of the local legislative body and a determination by the State Commissioner of Transportation of compliance with his regulations before any airport facility may be approved. The former ordinance, which provided for local authorization by the Director of Licenses and Commissioner of Police but not the Common Council, and permitted local approval without a state determination of compliance, was inconsistent with General Business Law §249 and was, therefore, invalid (*see*, Pero v City of Batavia, 99 AD2d 668, *affirmed* 63 NY2d 971). The Director of Licenses was powerless to authorize the heliport and the temporary permit he issued was without legal effect (*see*, Matter of EFS Ventures Corp. v Foster, 71 NY2d 359, 371). It follows that plaintiff is entitled to a declaration that the heliport is being operated in violation of General Business Law §249.

We also conclude that plaintiff is entitled to the injunctive relief it seeks. In this regard, there is no merit to defendant's argument that the doctrine of estoppel should be invoked against plaintiff. Generally, estoppel may not be invoked against a municipality to prevent it from discharging its statutory duties or to compel the ratification of an administrative error (*see*, Matter of Parkview Assocs. v City of New York, 71 NY2d 274, *cert denied* _____ US _____, 109 SCt 30; Scruggs-Leftwich v Rivercross Tenants' Corp., 70 NY2d 849; Morley v Arricale, 66 NY2d 665). Although the Director of Licenses erred in issuing a temporary permit for the heliport, it is equally clear that the exercise of reasonable diligence by defendant would have readily uncovered the existence of General Business Law §249 (*see*, Matter of Parkview Assocs. v City of New York, *supra*, at 282). Defendant should have been aware that it could acquire legal authorization for the heliport only in accordance

with the requirements of that statute (*see,* Thomson Ind. v Incorporated Vil. of Port Washington North, 27 NY2d 537; *see also,* Matter of Boardwalk & Seashore Corp. v Murdock, 286 NY 494, 498; Matter of Dyl & Dyl Development Corp., 31 AD2d 818). Thus the doctrine of estoppel will not be invoked against plaintiff.

We have reviewed defendant's other arguments on appeal and find them to be without merit. We note, however, that the Common Council has amended the city ordinance to comport with state law (*see,* Buffalo Code, ch VII, art I-a, §3) and defendant is not precluded from filing an appropriate application for approval of the heliport operation pursuant to that ordinance. It does not appear in this record that such an application has been filed. (Appeal from Order of Supreme Court, Erie County, Wolfgang, J.—Summary Judgment.) Present: Dillon, P.J., Doerr, Boomer, Green, Pine, JJ.

APPENDIX "C"

Order of the New York Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of June A. D. 1989.

Present: HON. SOL WACHTLER, *Chief Judge, presiding.*

CITY OF BUFFALO,

Respondent,

v.

BUCHOLTZ AVIATION, INC.,

Appellant.

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4 Mo. No. 588 SSD 40.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

APPENDIX "D"

Sections 240 and 249 of the New York General Business Law

§240. Definitions.

When used in this article,

1. "Aircraft" means any contrivance, now or hereafter invented, for avigation of or flight in the air, except a parachute or other contrivance designed for use, and carried primarily for safety equipment.

2. "Avigation" means the steering, directing or managing of an aircraft, in or through the air; and such term is here used as a substitute for "aerial navigation."

3. "Operating aircraft" means performing the services of aircraft pilot.

4. "Landing area" means any locality either of land or water, including airports and intermediate landing fields, which is used or intended to be used for the landing and take-off of aircraft, whether or not facilities are provided for shelter, servicing or repair of aircraft or for receiving or discharging passengers or cargo.

5. "Airport" means any landing area used regularly by aircraft for receiving or discharging passengers or cargo; or for the landing and take-off of aircraft being used for personal or training purposes.

6. "Acrobatic flying" means maneuvers not necessary for normal flight and intentionally performed by an aircraft, involving an abrupt change in its attitude, an abnormal attitude or an abnormal acceleration.

7. "Administrator of the federal aviation agency" means the administrator of the federal aviation agency of the United States.

8. "Airplane" means a mechanically propelled aircraft, the support of which in flight is derived dynamically from the reaction on surfaces in a fixed position relative to the aircraft but in motion relative to the air.

9. "Control zone" means an airspace of defined dimensions extending upwards from the surface of the ground and including one or more airports and designated as such by the administrator of the federal aviation agency.

10. "Flight visibility" means the average horizontal distance that prominent objects may be seen from the cockpit.

11. "Helicopter" means an aircraft, the support of which in the air is normally derived from airfoils mechanically rotated about an approximately vertical axis.

12-14. Repealed.

15, 16. Renumbered 9, 10.

17. Repealed.

18. Renumbered 11.

§249. Location of privately-owned airports

1. Legislative findings and purpose. The continuing development and the rapid growth of air transportation and the use of aircraft for various purposes, both commercial and private, during the last twenty years, has substantially contributed to the economic betterment, well-being and recreational enjoyment of the people of the state. The increased number, size and growth of airports resulting from operation requirements of newer and larger aircraft operating more frequently has brought about a conflict of land use. This is of particular concern to the state in major public works construction such as highways, public buildings and facilities. There is authority for municipalities to control the establishment or improvement of publicly-owned airports and landing areas so as to assure coordination between developments in the field of public works. Uncontrolled establishment of privately-owned airports and landing areas could seriously impair the existing federal-state highway program. Federal-aid highway funds may not be used for reconstruction or relocation of any highway, the usefulness of which may be impaired by the location or extension of an airport. This activity also presents major problems for municipalities particularly where the airport or operations therefrom span more than one municipality.

The legislature, therefore, finds that in order to meet the problems of local government in the establishment of privately-owned airports and landing areas and to insure coordination between developments in the field of public works that certain criteria be met in the location of or extension of a privately-owned airport or landing area.

2. Definitions. When used in this section:

a. Airport means both an airport and landing area as defined in section two hundred forty of this article.

b. Airport improvement means the extension, alteration, addition to or realignment of the runways of an existing privately-owned airport or the modification in any way of the landing and take-off directions at such a privately-owned airport.

3. Approval of privately-owned airports. No person shall hereafter establish a privately-owned airport or make an airport improvement to an existing privately-owned airport except by authorization of the governing body of the city, village or town in which such airport or any part thereof is proposed to be established or improved. The governing body of a city, village or town shall not authorize the establishment of such an airport or an airport improvement at a requested location unless in accordance with the standards prescribed by the commissioner of transportation. The local governing body of a city, village or town shall, prior to granting such authorization, request the commissioner of transportation to determine whether or not the establishment of such a privately-owned airport improvement complies with his standards. In order to make such a determination of compliance, the commissioner of transportation must first make findings of fact (1) that operations of such airport will not conflict with or affect the safety of public buildings or facilities, or operations on public highways or waterways; and (2) that the volume, character and direction of traffic at such airport will not constitute a menace to the safety of operations at other airports in the vicinity. Approval for the establishment of such an airport or airport improvement may be subject to any reasonable

conditions which the commissioner of transportation may deem necessary to effectuate the purposes of this section.

4. Hearings. In connection with his determination as to whether the establishment of a privately-owned airport or an airport improvement as defined in this section complies with his standards the commissioner of transportation may on his own motion or upon the request of an affected or interested person or of the governing body of the city, village or town requesting such determination of compliance, hold a hearing as provided in subdivision five below.

5. Investigations, hearings. The commissioner of transportation or any officer or employee of the department of transportation designated by the commissioner of transportation, shall have the power to conduct investigations and inquiries and to hold hearings concerning matters covered by this act and the rules, regulations and orders of the commissioner of transportation. Hearings shall be held upon such call or notice as the commissioner of transportation or his duly designated representative shall deem advisable. The commissioner of transportation and each person designated by him to conduct any investigation or inquiry, or to hold any hearing shall have the power to administer oaths and affirmations, certify to all official acts, issue subpoenas, and order the attendance and testimony of witnesses and the production of books, papers and documents. In the case of the failure of any person to comply with any subpoena or order issued under the authority of this section, the commissioner of transportation or his authorized representative may invoke the aid of any court of general jurisdiction of this state. The court may thereupon order such person to

comply with the requirements of the subpoena or order to give evidence touching the matter in question. Failure to obey the order of the court may be punished by the court as a contempt thereof.

6. Rules and regulations. The commissioner of transportation is authorized to adopt such rules and regulations as may be necessary for the proper administration and enforcement of the provisions of this section, but not inconsistent therewith, and to amend or repeal any of such rules and regulations.

7. Delegation of powers. The commissioner of transportation may, except as to rule-making powers, by a writing filed in the office of the department designate any officer or employee of the department of transportation to carry out his duties under this section.

8. Nothing in this section shall be construed to deny the governing body of any city, village or town the right to perform any lawful regulatory activity relating to privately-owned airports, which is not within the purposes or scope of this section.

APPENDIX "E"

City of Buffalo Ordinance Relating to Aircraft, as Amended July 22, 1975

CH. VII REGULATORY ORDINANCES

ARTICLE I-A. AIRCRAFT

Sec. 1-A. Definitions.

The term "aircraft" as used in this article means any contrivance now known or hereafter invented, used or designed for navigation of or flight in the air, except a parachute or other contrivance used primarily as safety equipment.

Sec. 2. Use Regulated.

(a) No person, firm or corporation shall fly or permit any aircraft to be flown over any part of the city at an altitude of less than one thousand (1,000) feet above the highest obstacle within a horizontal radius of two (2) miles from the aircraft except in landing or on taking off from the waters of Lake Erie, the Niagara River or the Buffalo Harbor. Such landings, or takeoffs shall be made at such minimum safe altitudes as will not endanger persons or property on the surface or other aircraft.

Helicopters, however, may be flown at less than the minimum prescribed herein and may land or take off at places of landing within the city designated as such for temporary or permanent use by the director of licenses and permits with the approval of the commissioner of police, provided that such operations are conducted without hazard to persons or property on the surface or to other aircraft and without undue interference with the use of property on the surface and at an altitude which will permit an emergency landing without undue hazard

to persons or property on the surface and provided, further, that the commissioner of transportation in the interest of safety may prescribe specific routes and altitudes for such operations to which helicopters shall conform, and provided further, that any person, firm or corporation desiring to land a helicopter on any site within the city, not permanently designated for said purpose, shall submit said request, in writing, to the director of licenses and permits at least one (1) day in advance of the date of landing together with a certified copy of an insurance policy covering said person, firm or corporation against public liability and property damage in connection with said operation, and in addition, the said person, firm or corporation shall file with the director of licenses and permits an insurance policy of public liability and property damage in which policy the city of Buffalo is the named insured. Said policies shall be in the amounts of one hundred thousand dollars/three hundred thousand dollars ($100,000.00/$300,000.00) for public liability and two hundred thousand dollars ($200,000.00) for property damage. Certificates of said insurance policy evidencing that the above required insurance is in effect must also be furnished before the director of licenses and permits can approve said request.

The above regulations shall not apply to helicopters used directly by governmental agencies for governmental purposes.

(b) It shall be unlawful for any person to operate an aircraft either on the ground, on the water or in the air within the limits of the city while under the influence of intoxicating liquor, narcotics or other habit-forming drugs, or to operate an aircraft in a careless or reckless manner so as to endanger life or property of another. Violation of the standards for safe operation of aircraft

prescribed by federal or state statutes or regulations shall be deemed careless or reckless operation of aircraft within the meaning of this article.

(c) It shall be unlawful for any person to jump or leap from an aircraft in a parachute or any other device within the limits of the city, except in the event of imminent danger.

(d) It shall be unlawful for any person to operate an aircraft within the limits of the city in any manner prohibited by any provision of or contrary to the rules and regulations of the Civil Aeronautics Administration or the Civil Aeronautics Board or the laws of the state of New York.

APPENDIX "F"

City of Buffalo Ordinance Relating to Aircraft, as Amended September 15, 1987

CH. VII BUFFALO CODE

ARTICLE I-A. AIRCRAFT

Sec. 1-A. Definitions.

The term "aircraft" as used in this article means any contrivance now known or hereafter invented, used or designed for navigation of or flight in the air, except a parachute or other contrivance used primarily as safety equipment.

Sec. 2. Use Regulated.

(a) No person, firm or corporation shall fly or permit any aircraft to be flown over any part of the city at an altitude of less than one thousand (1,000) feet above the highest obstacle within a horizontal radius of two (2) miles from the aircraft except in landing or on taking off from the waters of Lake Erie, the Niagara River or the Buffalo Harbor. Such landings or takeoffs shall be made at such minimum safe altitudes as will not endanger persons or property on the surface or other aircraft.

Helicopters, however, may be flown at less than the minimum prescribed herein and may land or take off at places of landing within the city designated as such for temporary or permanent use, as hereinafter prescribed; provided, that such operations are conducted without hazard to persons or property on the surface or to other aircraft and without undue interference with the use of property on the surface and at an altitude which will permit an emergency landing without undue hazard to persons or property on the surface; and provided,

further, that the commissioner of public works, in the interest of safety, may prescribe specific routes and altitudes for such operations to which helicopters shall conform; and provided further, that any person, firm or corporation desiring to land a helicopter on any site within the city, not permanently designated for said purpose, and for no longer than two (2) consecutive days, shall submit said request, in writing, to the director of licenses at least one (1) day in advance of the date of landing. Any person, firm or corporation which lands a helicopter on any site in the city shall first submit to the director of licenses a certified copy of an insurance policy covering said person, firm or corporation against public liability and property damage in connection with said operation, and in addition, the person, firm or corporation shall file with the director of licenses an insurance policy of public liability and property damage in which policy the city of Buffalo is the named insured. Said policies shall be in the amounts of five million dollars ($5,000,000.00) for public liability and one million dollars ($1,000,000.00) for property damage. Certificates of said insurance policy evidencing that the above required insurance is in effect must also be furnished before the director of licenses can approve said request.

The above regulations shall not apply to helicopters used directly by governmental agencies for governmental purposes.

(b) It shall be unlawful for any person to operate an aircraft either on the ground, on the water or in the air within the limits of the city while under the influence of intoxicating liquor, narcotics or other habit-forming drugs, or to operate an aircraft in a careless or reckless manner so as to endanger life or property of another. Violation of the standards for safe operation of aircraft

prescribed by federal or state statutes or regulations shall be deemed careless or reckless operation of aircraft within the meaning of this article.

(c) It shall be unlawful for any person to jump or leap from an aircraft in a parachute or any other device within the limits of the city, except in the event of imminent danger.

(d) It shall be unlawful for any person to operate an aircraft within the limits of the city in any manner prohibited by any provision of or contrary to the rules and regulations of the Civil Aeronautics Administration or the Civil Aeronautics Board or the laws of the state of New York. (Ord. of 9-29-87)

Sec. 3. Location of Privately-Owned Airports.

(a) No person shall hereafter establish a privately-owned airport or make an improvement to an existing privately-owned airport except by authorization of the common council. The term "airport" shall mean and include: any landing area used regularly for receiving or discharging passengers or cargo; any landing area being used for personal or training purposes; and any locality either of land or water which is used or intended to be used for the landing and take-off of aircraft, whether or not facilities are provided for shelter, servicing or repair of aircraft or for receiving or discharging passengers or cargo. The term "airport improvement" shall include: extension; alteration; modification; addition to or realignment of the runaway(s) of an existing airport; or the modification in any way of the landing or take-off directions at such airport.

(b) Any person seeking to establish a privately-owned airport or make an improvement to an existing privately-owned airport shall file an application therefor with the common council which shall contain at least the following information:

(1) Name and address of applicant.

(2) Detail of the type of aviation service proposed.

(3) Number and type of aircraft expected to be based at the airport.

(4) Whether an instrument approach procedure will be requested for the airport.

(5) Maximum number of daily operations and the anticipated total annual operations.

(6) Evidence that the airport is privately-owned and that all owners of the real property have consented to establishment or improvement of a privately-owned airport.

(7) One (1) United States Geological Survey topographical map, scale 1:24,000, of the area proposed for the establishment or improvement of a privately-owned airport.

(8) One (1) plan view map, scale 1:1,000, with the position of the airport indicated thereon. The airport runway(s), helipad or seaplane operational area must be plotted thereon accurately. Such map must include the direction and length of runways and seaplane operational areas. Helipads must be precisely located with all approach and departure paths clearly indicated. The map must be sufficiently large so as to include all approach and lateral transition zones to the airport.

(9) A copy of the favorable airspace determination issued by the Federal Aviation Administration for the proposed airport establishment or improvement.

(c) Upon receipt of the completed application, the common council shall forward same to the New York State Commissioner of Transportation and adopt a resolution requesting the commissioner to determine whether the establishment or improvement complies with the standards of the Department of Transportation pursuant to section two hundred forty-nine of the New York General Business Law. The application shall also be referred to the commissioner of police, commissioner of fire, commissioner of public works and director of licenses for their review and determination whether the establishment or improvement of the privately-owned airport complies with applicable codes, ordinances and public safety requirements.

(d) Upon receipt of the determination required by this section, the common council shall hold a public hearing on the proposal, upon due notice, at which all interested parties shall be afforded an opportunity to present evidence and testimony.

(e) The common council may grant permission to establish or improve such privately-owned airport upon consideration of all information before it; provided, however, that no such permission shall be granted unless the privately-owned airport is in accordance with the standards prescribed by the New York Commissioner of Transportation or unless such standards have been waived.

(f) No privately-owned airport shall hereafter be established or improved if the proposed location is within fifteen hundred (1,500) feet of property used for residential purposes. However, this prohibition may be waived upon presentation to the common council of a validated petition requesting such waiver, signed by sixty-five (65) per cent or more of those persons having their residence within fifteen hundred (1,500) feet of the proposed location or improvement. (Ord. of 9-29-87)

APPENDIX "G"

28 U.S.C. §§1348, 1431

§1348. Airspace control and facilities

(a) Use of airspace

The Secretary of Transportation is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

(b) Air navigation facilities; performance of functions by Federal department or agency

The Secretary of Transportation is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic. The Secretary may, subject to such regulations, supervision, and review as he may prescribe, from time to time make such provision as he shall deem appropriate authorizing the performance by a Federal department or agency, with the consent of the department or agency, of any function under this subsection.

(c) Air traffic rules

The Secretary of Transportation is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

(d) Applicability of administrative procedure provisions

In the exercise of the rulemaking authority under subsections (a) and (c) of this section, the Secretary of Transportation shall be subject to the provisions of subchapter II of chapter 5 of Title 5, notwithstanding any exception relating to military or naval functions in section 553 of Title 5.

(e) Exemptions

The Secretary of Transportation from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest.

(f) Exception for military emergencies

When it is essential to the defense of the United States because of a military emergency or urgent military necessity, and when appropriate military authority so determines, and when prior notice thereof is given to the Secretary of Transportation, such military authority may authorize deviation by military aircraft of the national

defense forces of the United States from air traffic rules issued pursuant to this subchapter. Such prior notice shall be given to the Secretary of Transportation at the earliest time practicable and, to the extent time and circumstances permit, every reasonable effort shall be made to consult fully with the Secretary of Transportation and to arrange in advance for the required deviation from the rules on a mutually acceptable basis.

* * *

§1431. Control and abatement of aircraft noise and sonic boom

Definitions

(a) For purposes of this section:

(1) The term "FAA" means Administrator of the Federal Aviation Administration.

(2) The term "EPA" means the Administrator of the Environmental Protection Agency.

Consultations; standards; rules and regulations; aircraft certificates

(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate

authorized by this subchapter. No exemption with respect to any standard or regulation under this section may be granted under any provision of this chapter unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

(2) The FAA shall not issue an original type certificate under section 1423(a) of this title for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d) of this section.

(c) Submission of proposed regulations to FAA by EPA; publication; hearing; review of prescribed regulations; report and supplemental report

(1) Not earlier than the date of submission of the report required by section 4906 of Title 42, EPA shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its

submission to the FAA, publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within ninety days after the conclusion of such hearing and after consultation with EPA, the FAA shall—

> (A) in accordance with subsection (b) of this section, prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or
>
> (B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations and a detailed analysis of and response to all documentation or other information submitted by the Environmental Protection Agency with such proposed regulations.

* * *

(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1)(A)(ii) or (1)(B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and

shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 4332(2)(C) of Title 42 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 4332(2)(C) of Title 42, the report of the FAA indicates that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

Considerations determinative of standards, rules, and regulations

(d) In prescribing and amending standards and regulations under this section, the FAA shall—

(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;

(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

Amendment, modification, suspension, or revocation of certificate; notice and appeal rights

(e) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 1429 of this title, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the FAA if it finds that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation.

Pub.L. 85-726, Title VI, §611, as added Pub.L. 90-411, §1, July 21, 1968, 82 Stat. 395, and amended Pub.L. 92-574, §7(b), Oct. 27, 1972, 86 Stat. 1239.